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No. 06-1611

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

TONY HAYS, CHARLES C. THOMPSON, II, WORLDNETDAILY.COM, and REBECCA HAGELIN,

Petitioners,

v.

CLARK JONES,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether jurisdiction exists in this Court where: (1) no final decision has been made by the Supreme Court of Tennessee and the decision below involved the interpretation of a Tennessee statute and the limited right of appeal granted thereunder; and (2) the Petitioners waived their right to permissive interlocutory appeal in the state courts.

Whether certiorari is appropriate where the decision below does not conflict with any precedent of this Court, with any decision of the U.S. Courts of Appeals, nor with any decision of the highest court of any other state.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE AND PERTINENT FACTS	1
REASONS CERTIORARI SHOULD BE DENIED	3
I. There Is No Final Judgment In This Case. Therefore, There Is No Jurisdiction Under 28 U.S.C. §1257	3
II. (a) The Petitioners Had No Statutory Right To Interlocutory Appeal Of A Pretrial Ruling By The State Trial Court. As A Result, Their Appeal Below Was Dismissed	4
(b) No Federal Statutory Or Constitutional Right Is Implicated By The Dismissal Of The Appeal	5
III. Petitioners Are Subject To The Procedural Rules Of Tennessee Courts	6
IV. No Common Law Or Tennessee Constitutional News Gatherer's Privilege Exists In Defamation Cases	6
V. The Decision Below Is Not Contrary To The Precedents Of This Court Or Federal Law	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) 8, 9

Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958) 8

In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh. en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied, Miller v. U.S.*, 545 U.S. 1150 (2005), *opinion superseded by In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006) 9

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004) 9

Johnson v. California, 541 U.S. 428, 124 S.Ct. 1833, 158 L.Ed.2d 696 (2004) 3

Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005) 8

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) 3

FEDERAL STATUTES

28 U.S.C. §1257 3

STATE CONSTITUTION

Tennessee Constitution, Section 19, Article I 7

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Dibble v. WROC TV Channel 8, 142 A.D.2d 966, 530 N.Y. 2d 388 (N.Y. App. Div. 1988) 6

Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) 7

STATE STATUTES

T.C.A. §24-1-208 ..... 2, 3

T.C.A. §24-1-208(a) 4, 5

T.C.A. §24-1-208(b) 4, 5

T.C.A. §24-1-208(c) 4, 5

T.C.A. §29-24-103 1

STATE RULES

Tennessee Rules of Appellate Procedure, Rule 9 .....2, 4, 5

Tennessee Rules of Appellate Procedure, Rule 10 ..2, 4, 5, 10

Tennessee Rules of Civil Procedure, Rule 26..... 6

Tennessee Rules of Civil Procedure, Rule 33..... 6

Tennessee Rules of Civil Procedure, Rule 34..... 6

Tennessee Rules of Civil Procedure, Rule 37..... 2,6

Tennessee Rules of Evidence, Rule 501 6

TABLE OF APPENDICES

Page

Appendix A: *Tennessee Rules of Appellate Procedure*, Rule 9 ..... App. 1

Appendix B: *Tennessee Rules of Appellate Procedure*, Rule 10 ..... App. 3

STATEMENT OF THE CASE AND PERTINENT FACTS

After demanding Petitioners to retract their defamatory statements pursuant to T.C.A. §29-24-103 (T/R Vol. 33, pp. 90-91), Respondent sued Petitioners in the Circuit Court of Hardin County, Tennessee for defamation, alleging that articles published and widely disseminated by Petitioners between September of 2000 and October of 2003 portraying him as a narcotics trafficker, "dope dealer," obstructor of justice, trader of TVA permits for political contributions and arsonist were false and malicious.[1] (T/R Vol. 2, pp. 2-14, 56-60, 144-145; T/R Vol. 3 pp. 108-111, 120-122; T/R Vol. 5, pp. 56-67; T/R Vol. 10, pp. 116-124, T/R Vol. 18, p. 5; T/R Vol. 21, pp. 43-45, 57-59; T/R Vol. 25, pp. 8-16; T/R Vol. 30, pp. 92-110; T/R. Vol. 26, p. 66)

During pretrial discovery, which is ongoing, Respondent was able to refute every defamatory statement attributed to identified sources (who repudiated the attribution) by deposition testimony, requests for production, sworn statements, and/or records from those sources. (T/R Vol. 11, pp. 52, 110-155; T/R Vol. 16, pp. 99-104, 124-131, 139-146; T/R Vol. 30, pp. 2-10, Dep. of Shutt, pp. 107-115; Vol. 31, pp. 47-48, 50, Dep. Isbell, pp. 16-20; T/R Vol. 35, Dep. Beck, pp. 84-85, 93-94; T/R Vol. 36, p. 82 *et seq.*)

Through depositions, interrogatories, requests for production, and requests for admission, under the Tennessee

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[1] Contrary to the claim of WorldNetDaily.com, the facts below show that it publicly claimed to have actively investigated, interviewed witnesses and obtained the information upon which the articles were based. (T/R Vol. 2, pp. 2-14; Farah Aft., filed 7/29/04, pp. 6-7, ¶55.)

Rules of Civil Procedure, the Respondent sought the identity of fact witnesses, including unidentified sources of the defamatory statements. Petitioners adamantly refused. Pursuant to Rule 37, T.R.C.P., Respondent moved to strike the defenses of Petitioners that relied upon the alleged unidentified sources. (T/R Vol. 1, pp. 14-17; T/R Vol. 3, pp. 20-34; T/R Vol. 3, pp. 83-84; T/R Vol. 4, pp. 96-100; T/R Vol. 4, pp. 101-102; T/R Vol. 10, pp. 68-70; T/R Vol. 14, pp. 16-18, 20-25, 35-36, 47, 85-86, 121-122, 107-108, 112, 133-134, 136-137, Dep. T. Hays, 12/2/03, pp. 46-48, 50-52, 65-66, 77, 108, 112, 133-134, 136-137, 141, 150-151; T/R Vol. 21, pp. 31-32, 67-73, Dep. T. Hays, 5/7/04, pp. 273-274, 309-315)

After giving the Respondents the opportunity to provide the discovery and their refusal, the trial court entered an Order on April 8, 2005, striking the defenses relying on the unidentified sources. (Petitioners' Appendix Q1.)

The Respondents filed an interlocutory appeal having as its only basis:

> T.C.A. §24-1-208[2] provides a Rule 3 statutory right of Appeal to this Court from the trial court's order of April 8, 2005.

(Brief of Hays & Thompson to Tennessee Court of Appeals, p. 2.)

None of the Respondents attempted to obtain permission for interlocutory appeal from the trial court based on Rule 9 or from the Tennessee Court of Appeals based on Rule 10 of the Tennessee Rules of Appellate Procedure.

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[2] Petitioners' Appendix Z1.

(Appendices A and B.) The Tennessee Court of Appeals found that no statutory news gatherer privilege exists under T.C.A. §24-1-208 in defamation cases and dismissed the appeal. (Petitioners' Appendix H1.) Petitioners Hays and Thompson, WorldNetDaily.com and Hagelin's requests for rehearing were denied. (Petitioners' Appendices D1 and E1.)

The Tennessee Supreme Court denied permission to appeal the ruling of the Court of Appeals. (Petitioners' Appendix A1.)

Respondents now seek certiorari.

REASONS CERTIORARI SHOULD BE DENIED

Review of the status of this litigation demonstrates that this case is not appropriate for certiorari.

I. There Is No Final Judgment In This Case. Therefore, There Is No Jurisdiction Under 28 U.S.C. §1257.

This case is in pretrial discovery. There has been no trial nor a final judgment by the Supreme Court of Tennessee. Therefore, the Petition fails for lack of jurisdiction. 28 U.S.C. §1257. *Johnson v. California*, 541 U.S. 428, 124 S.Ct. 1833, 158 L.Ed.2d 696 (2004); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973).

II. (a) The Petitioners Had No Statutory Right To Interlocutory Appeal Of A Pretrial Ruling By The State Trial Court. As A Result, Their Appeal Below Was Dismissed.

The Petitioners seek a writ from this Court concerning a ruling by a state trial court as to pretrial discovery and evidence in a case not yet tried, where discovery is incomplete and where no interlocutory appeal exists.

Contrary to Petitioners' assertion, they had no statutory right to appeal the trial court's pretrial ruling. They did not request permission to appeal as required by the Tennessee Rules of Appellate Procedure, Rules 9 and 10.[3] Therefore, they waived any permissive appeal. Their appeal was wholly dependent on their claim to a statutory right that they did not possess under T.C.A. §24-1-208(c).

T.C.A. §24-1-208(a) provides for a limited news gatherer's privilege but subsection (b) specifically states:

> **Subsection (a) shall not apply with respect to the source of any alleged defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.** (Emphasis added.)

Therefore, there is *no* privilege provided by the statute in a defamation case.

T.C.A. §24-1-208(c) provides that one seeking information protected under subsection (a) of the statute "may

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[3] Rules 9 and 10 of the Tennessee Rules of Appellate Procedure govern interlocutory appeals where no statutory right exists. Petitioners made no attempt below to comply with these rules.

apply for an order divesting such protection." Such requirement does not and cannot apply to this defamation case because under subsection (b), the limited statutory news gatherer privilege granted by subsection (a), does not exist. Since no privilege exists, the statutory procedure for appealing an order divesting the subsection (a) privilege set forth in subsection (c) does not apply. No privilege existed to be ordered divested. Respondent sought no order divesting any privilege. There was no "order" as defined by the statute to appeal.

(b) No Federal Statutory Or Constitutional Right Is Implicated By The Dismissal Of The Appeal.

The Tennessee courts interpreted the Tennessee statute and specifically found that there was no statutory privilege here. Therefore, the appeal provisions of the statute *ipso facto* were inapplicable *sub judice* and Petitioners' appeals were dismissed.

Using the mechanism of the nonexistent statutory right of appeal claimed under T.C.A. §24-1-208(c)(3)(A), Petitioners attempted to also argue on appeal that they possess a "qualified privilege" under the First Amendment, wholly separate from the statutory privilege upon which their interlocutory appeal had to be based. Since they did not seek a Rule 9 or 10 permissive interlocutory appeal of that issue or any other, they waived any interlocutory appeal on these issues.

Ignoring the procedural requirements for an interlocutory appeal, Petitioners now attempt to bootstrap their constitutional argument onto a non-existent statutory right to appeal the trial court's interlocutory ruling as to

discovery sanctions imposed under Rule 37, T.R.C.P. even though their appeal was "dismissed."

III. Petitioners Are Subject To The Procedural Rules Of Tennessee Courts.

Petitioners steadfastly refused to comply with the rules of discovery[4] before the trial judge and refused to identify fact witnesses, "confidential sources," of the defamatory material, even when given the choice between disclosure or having their defenses based upon such "sources" stricken. Striking those defenses dependent upon undisclosed "confidential sources" when the Petitioners steadfastly refused to produce discovery of the identity of those alleged fact witnesses is a recognized and appropriate remedy. Rule 37, T.R.C.P.; See also, *Dibble v. WROC TV Channel 8*, 142 A.D.2d 966, 530 N.Y. 2d 388 (N.Y. App. Div. 1988).

IV. No Common Law Or Tennessee Constitutional News Gatherer's Privilege Exists In Defamation Cases.

Rule 501 of the Tennessee Rules of Evidence provides:

> Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
>
> 1. Refuse to be a witness;
>
> 2. Refuse to disclose any matter;
>
> 3. Refuse to produce any object or writing; or

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[4] Rules 26, 33, 34, 37, T.R.C.P.

4. Prevent another from being a witness or disclosing any matter or producing any object or writing.

There has never been a reporter's privilege recognized under Tennessee's Constitution, the common law, court rules, or the rules of evidence.

Section 19, Article I of the Tennessee Constitution reads, in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.
>
> The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty*. (Emphasis added.)

The Tennessee state constitution "does not constitutionalize false and malicious defamations, and publishers are answerable for abuse." *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978). Thus, there is no evidentiary or shield privilege found in Tennessee's constitution or common law that would immunize defamers.

V. The Decision Below Is Not Contrary To The Precedents Of This Court Or Federal Law.

Petitioners seek to expand the very limited ruling of the Tennessee trial court and appellate courts below beyond their scope. In addition, they blur the distinction between the guarantee under the First Amendment to the United States Constitution that one may print or publish

what one chooses and no law may prohibit such publication and the clearly stated law that one is responsible for abusing that privilege in defamation cases. The First Amendment to the United States Constitution does not create a reporter's privilege as to disclosure of confidential sources. In *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court rejected the claim of First Amendment privileges for reporters in a case involving a grand jury subpoena. The Court expressly declined to create a privilege that would interpret the First Amendment to grant reporters a testimonial privilege that other citizens do not enjoy. *Id.* at 690, 92 S.Ct. at 2661. The rejection of the claim of a First Amendment privilege was, however, broader than just grand jury proceedings as the Court also recognized that there are also situations "where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." In this situation, the Court was equally adamant in rejecting the claim of a First Amendment privilege. *Id.* at 693-695, 92 S.Ct. 2662-2663.

Significantly, the *Branzburg* court noted that the first assertion by a news gatherer of a privilege from public disclosure of confidential informant was pursuant to a subpoena issued in a civil defamation suit in *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958).[5] In *Garland*, the asserted privilege was also denied. *Branzburg*, 408 U.S. at

[5] Even in non-defamation civil cases involving non-party witnesses, those courts that have recognized a statutory or common law qualified privilege have found that a litigant's right to evidence trumps any claim by the reporter to "confidential sources." See, for example, *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (qualified privileged trumped by litigant's right to evidence).

686, 92 S.Ct. at 2659. That no privilege exists involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire nor does it threaten the vast bulk of confidential relationships between reporters and their sources. *Id.* at p. 691, 92 S.Ct. at 2661. The First Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. *Id.* The defamation alleged here is such reprehensible conduct.

The common law recognized no such privilege and any argument based on any constitutional argument was not even asserted until 1958. *Id.* at 698, 92 S.Ct. 2665. "From the beginning of our country, the press has operated without constitutional protection for press informant, and the press has flourished." The court noted that the administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. *Id.* at 703, 92 S.Ct. 2668. As an example, the court points out that any author could quite accurately assert that he is contributing to the flow of information to the public and that he relies on confidential sources that would be silent if he is forced to make disclosure. *Id.*

Thus, *Branzburg* "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or a newly hewn common law privilege." *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004); *accord In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *reh. en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied, Miller v. U.S.*, 545 U.S. 1150 (2005), *opinion superseded by In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

Respondent respectfully submits, therefore, that there is no constitutional protection under the First Amendment for a claimed reporter's privilege and, especially, in a defamation action and the decision of the state courts dismissing Petitioners' interlocutory appeal does not even arguably raise a constitutional question.

CONCLUSION

Since the decision from which Petitioners seek certiorari is an interlocutory decision interpreting a Tennessee statute, the Tennessee Supreme Court has not decided any important federal question in a way that conflicts with the precedent of this court or any other state court of last resort nor has it decided an important question of law that has not been settled by this Court. See, Supreme Court Rule 10(b) and (c).

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

TENNESSEE RULES OF APPELLATE PROCEDURE

C. APPEAL BY PERMISSION

RULE 9. INTERLOCUTORY APPEAL BY PERMISSION FROM THE TRIAL COURT.

(a) Application for Permission to Appeal; Grounds. Except as provided in rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not

limit the scope of review upon an appeal as of right from entry of the final judgment.

(b) Procedure in the Trial Court. The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may thereupon in its discretion allow an appeal from the order.

(c) How Sought in Appellate Court; Cost Bond. The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

APPENDIX B

TENNESSEE RULES OF APPELLATE PROCEDURE

APPEAL BY PERMISSION

RULE 10. EXTRAORDINARY APPEAL BY PERMISSION ON ORIGINAL APPLICATION TO THE APPELLATE COURT.

(a) Original Application for Extraordinary Appeal; Grounds. An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals: (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. the appellate court may issue whatever order is necessary to implement review under this rule.

(b) How Sought; Cost Bond. An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. Unless necessity requires otherwise, the application shall be served on all other parties in the manner provided in rule 20 for the service of papers. The appeal shall be docketed in accordance with rule 5(c) upon the filing of the application with the clerk of the appellate court. An appeal from the denial of an application for extraordinary appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in this

rule within 30 days of the filing date of the intermediate appellate court's order. A bond for costs as required by Rule 6 shall be filed with the application.

(c) Content of Application. The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an extraordinary appeal lies; (3) a statement of the reasons supporting an extraordinary appeal, and (4) the relief sought. The application shall be accompanied by copies of any order or opinion or parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents. The application to the Supreme Court shall include the application filed in the intermediate appellate court and a copy of the intermediate appellate court's order.

(d) Subsequent Procedure. If the appellate court is of the opinion that an extraordinary appeal should not be granted, it shall deny the application. Otherwise, the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order. The order shall be served on all other parties and if the application has not previously been served shall have attached thereto a copy of the application. The appellate court shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted.

(e) Appeal in Criminal Actions. Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

[Amended effective July 1, 1999; July 1, 2005.]